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IN THE

Supreme Court of the United States

October Term, 1977

No. 77-1687

JACOB JAMES DOST,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

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JACOB JAMES DOST,

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UNITED STATES OF AMERICA,

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

Petitioner, JACOB JAMES DOST, respectfully prays for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit to review its judgment affirming the judgment of conviction of the United States District Court for the District of New Mexico.

OPINIONS.

Trial was had in the United States District Court for the District of New Mexico and was by jury.

The United States Court of Appeals for the Tenth Circuit affirmed the judgment of the aforesaid District Court by a decision dated May 1, 1978. A copy of said Opinion is attached hereto as Appendix "A".

GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED.

1. The date of the judgment of the United States Court of Appeals for the Tenth Circuit sought to be reviewed is May 1, 1978. (Appendix "A").

2. A four count indictment was filed against petitioner on March 23, 1976, charging petitioner with violations of Title 18 U.S.C. Section 1461.

3. Count 1 charged petitioner with mailing advertisements and notices giving information where, how, from whom and by what means obscene material might be obtained in violation of Title 18 U.S.C. Section 1461; whereas the remaining three counts charged the petitioner with mailing obscene materials, either advertisements or photographs.

4. The trial commenced on July 12, 1976 and concluded on July 15, 1976. On July 15, petitioner was found guilty of all of the counts in which he was charged. On August 10, 1976, petitioner was sentenced as follows:

Count 2—to a term of imprisonment of 2 years.

As to Counts 1, 3 and 4, a fine of $5000.00 on each of these three counts, for a total of $15,-000.00.

In addition, imposition of sentence as to confinement only was suspended as to Counts 1, 3 and 4 and petitioner was placed on probation for a period of five years, with a special condition of probation that petitioner pay the fine assessed in such manner and at such times as the probation officer shall direct and shall refrain from engaging in any manner in the production and distribution or dissemination of sexually explicit material of any kind.

The court sentence appears at pages 225 and 226 of the Clerk's Transcript of the record on appeal (hereinafter all references to the Reporter's Transcript of the record on appeal will be referred to as RT).

Thereafter, petitioner filed a timely notice of appeal in the United States District Court and did appeal said conviction to the United States Court of Appeals for the Tenth Circuit.

On May 1, 1978, the United States Court of Appeals for the Tenth Circuit filed its judgment affirming the judgment of conviction of the United States District Court (Appendix "A").

It is that judgment of the United States Court of Appeals for the Tenth Circuit filed on May 1, 1978 that petitioner seeks a Writ of Certiorari to review.

5. The statutory provision which confers jurisdiction upon this Court to review the judgment in question by Writ of Certiorari is Title 28 U.S.C. Section 1254 (1).

QUESTIONS PRESENTED FOR REVIEW.

1. Was petitioner deprived of due process of law in allowing the age of the subject to be considered as a factor in determining the obscenity of the materials, *i.e.*, was it the law at the time of the alleged offense to treat photographs of children differently from photographs of adults, assuming the content of the photographs is the same except for the age of the subject?

a. Are the materials involved in the instant case obscene or unlawful when considered against proper constitutional standards?

2. Was petitioner deprived of due process of law when the court allowed the giving of the "pandering" instruction, and was there sufficient evidence produced at the trial to legally justify the invocation of that doctrine?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

Involved are the First and Fifth Amendments to the United States Constitution, Title 18 U.S.C. Section 1461.

STATEMENT OF THE CASE.

Petitioner seeks this Court's Writ of Certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit filed May 1, 1978 affirming petitioner's conviction in the United States District Court for the District of New Mexico by a judgment of conviction rendered following a jury trial under an indictment charging violations of Title 18 U.S.C. Section 1461.

The indictment was filed March 23, 1976 and was in four counts. Count 1 charged petitioner with mailing advertisements and notices giving information where, how, from whom and by what means, obscene matter might be obtained in violation of Title 18 U.S.C. Section 1461; the remaining three counts charged petitioner with mailing obscene materials, either advertisements or photographs.

Trial in the United States District Court commenced July 12, 1976 and concluded July 15, 1976.

On July 15, 1976, petitioner was found guilty on all counts on which he was charged. By the judgment of the United States Court of Appeals for the Tenth Circuit filed May 1, 1978, petitioner's conviction on all counts was affirmed.

DESCRIPTION OF THE MATERIAL INVOLVED.

The advertising material tells a prospective customer where he may obtain the photographs which were for sale and gives samples of photographs. The photographs involved are of nude female models; the age of the models is apparently very young, and this writer would assume that they would be between the ages of eight and sixteen. In none of the photographs is there depicted explicit sexual conduct, nor did any of the photographs depict sexual intercourse, oral copulation or sodomy.

1. Was Petitioner Deprived of Due Process of Law in Allowing the Age of the Subject to Be Considered as a Factor in Determining the Obscenity of the Materials, i.e., Was It the Law at the Time of the Alleged Offense to Treat Photographs of Children Differently From Photographs of Adults, Assuming the Content of the Photographs Is the Same Except for the Age of the Subject?

A. Are the Materials Involved in the Instant Case Obscene or Unlawful When Considered Against Proper Constitutional Standards?

It is critically important to note that this court has never passed on the question of whether the age of the subject of the work can legally make a significant difference in allowing the trier of fact to make a determination of obscenity.

Due process under the Fifth Amendment demands that criminal statutes tell persons what is prohibited. There was no reason for petitioner to believe that the standards for judging a photograph differed depending upon the age of the subject of the photograph.

Even Carl Koenig, a psychologist, called by the Government (RT 157-218) advised that his opinion

was based on the fact that these pictures were of children and that his testimony and opinion would be different if the subject matter were of adult persons. As a matter of fact, he stated that he had in the past testified that when such photographs, or more explicit photographs than in the instant case were involved, that they were not obscene when said photographs involved adults as the subject matter.

Attached hereto as Appendix "B" is Report 95-811 of the House of Representatives dated approximately November 4, 1977, which report contains proposed legislation concerning the sexual exploitation of children.

Since we cannot assume that the Congress of the United States would engage in useless activity in proposing the addition of Chapter 110 to Title 18 of the U.S.C., particularly Sections 2251, 2252 and 2253, the facts of this legislation would lead one to deduce that the use of children in sexually explicit photographs was not covered differently than adults in Title 18 U.S.C. Section 1461.

It is respectfully submitted that in allowing the age of the subject in the photographs to make a difference in determining what is obscene, important constitutional rights of the petitioner were violated. There can be no doubt that allowing the consideration of the age of the subject injected a highly prejudicial issue into the case.

Petitioner contends that if age does not make a difference, we must examine these photographs in the light of this court's decisions, particularly as they relate to that prong of the obscenity test regarding "patent offensiveness".

B. The Advertisements and Photographs Involved in the Instant Case Are Entitled to the Protection of the First Amendment to the United States Constitution; the Materials Involved Herein Are Not Obscene nor Unlawful When Considered Against the Proper Constitutional Standards.

Since the decision in *Miller v. California,* 413 U.S. 15, and the companion cases decided the same day (herein collectively referred to as the *Miller* cases) this Court has enunciated the current test of legal obscenity.

The test is as follows:

(a) Whether the average person applying contemporary community standards would find the work, taken as a whole, appeals to the prurient interest.

(b) Whether the work depicts or describes in a patently offensive way sexual conduct specifically defined; and

(c) Whether the work taken as a whole lacks serious literary, artistic, political or scientific value.

Petitioner contends that the court in the *Miller* decision reaffirmed the *Roth Memoirs* test and only changed the third prong of the test having to do with "utterly without redeeming social value" and substituting "serious, literary, artistic, political or scientific value" in lieu therefor.

In *Miller,* the court states at 413 U.S., p. 36

> "In sum, we (a) reaffirm the Roth holding that obscene material is not protected by the First Amendment; (b) hold that such material can be regulated by the States, subject to the specific safeguards enunciated above without a showing that the material is 'utterly without redeeming

social value', and (c) hold that obscenity is to be determined by applying contemporary community standards."

It is important to note that the materials in this case, when compared with materials involved in other cases before the United States Supreme Court, applying the correct constitutional standards, are protected.

With regard to the materials involved in the case which depict nudity in one form or another, it may be stated in general that said depictions of nudity are simply that. In all instances the depictions are photographs of one person in a normal pose of one kind or another. There are no depictions which include more than one person engaging in any sex acts whatever, nor is there even a hint of sexual activity in any of the pictures or depictions.

The following is a list of major Supreme Court decisions involving the finding of non-obscenity of similar materials to those involved in this case. In *Sunshine Book Company v. Summerfield,* 355 U.S. 372, a case involving nudist materials showing nude men, women and children, the United States Supreme Court simply reversed the lower court decision which held that the magazine "Sunshine and Health" was obscene.

In *Mounce v. United States,* 355 U.S. 180, the United States Supreme Court held that magazines entitled "Model Study", "International Journal" and "Helios" were not obscene. The magazines contained photographs of nude beings.

In *One, Inc. v. Oleson,* 355 U.S. 371, the Supreme Court held that the magazine entitled "One" was not obscene. The title of the magazine included the descriptive words "for homosexuals".

In *Manual Enterprises, Inc. v. Day,* 370 U.S. 478, the Supreme Court reversed a Circuit Court decision of the District of Columbia (289 F.2d 455) with regard to magazines which contain nude and nearly nude photographs of male models, which magazines were according to the Circuit's opinion "primary symbols of sexual fantasies of deviance within the homosexual group."

In *Rosenbloom v. Virginia,* 87 S.Ct. 2095, the nudist magazine "Solis" and 107 other nudist magazines were not obscene and were entitled to constitutional protection.

In *Avansino v. New York,* 388 U.S. 446, the Supreme Court found packets of photographs entitled to constitutional protection.

The aforesaid Supreme Court decisions running from *Sunshine Book Co. v. Summerfield* to the decision in *Rosenbloom v. Virginia,* involved a variety of nudist magazines and other publications and films visually depicting the nude body, both male and female with genitalia and pubic hair including a variety of poses and indicated that nudist magazines are entitled to protective guarantees of the First Amendment.

Thereafter, in *Excellent Publications, Inc. v. United States,* 309 F.2d 352, the First Circuit Court of Appeals held that "Front view group photographs of naked men, women and *children* with exposure of the genital areas of both sexes are not obscene as a matter of law." [Emphasis added].

In *Central Magazine Sales, Ltd. v. United States,* 389 U.S. 50, the Supreme Court reversed convictions of material described by the trial court as follows:

(*United States v. 392 Copies of Magazine entitled "Exclusive,"*, 253 Fed. 485).

> "The Material. The so-called 'magazine' 'Exclusive' is really a picture book containing 34 pictures of nude or almost nude women. In each picture the breasts and pubic hair fully exposed. In some of the pictures the women are wearing garter belts and silk stockings which focus attention on the pubic area. In some of the pictures the models are posed in lewd attitudes and positions. In several pictures the women are chained to a chair and their wrists are bound. The only written material is on the title page in English and two foreign languages, and appears verbatim in other 'magazines' published by Nordisk Bladcentral, of Copenhagen.
>
> 'International Nudist Sun No. 16' and 'Review International No. 6' each contain twenty posed pictures of well-developed nude men, with the focus in most instances on the penis, which is flagrantly displayed. Although posed in outdoor settings, in few of the pictures are the models engaging in any normal outdoor activities. The articles in both magazines are innocuous, dreary and puerile and bear little relation to the illustrations in any of the articles."

The Fourth Circuit Court of Appeals further characterized, and described the materials involved in affirming the trial court's decision. *United States v. 392 Copies of Magazine entitled "Exclusive"*, 373 F.2d 633, as follows:

> " 'Revue International' and 'International Nudist Sun' are collections of photographs of undressed

> males. These two magazines are comparable in all respects to 'Hellenic Sun Number Two,' which we held today in the Potomac News case to be obscene.
>
> 'Exclusive' is a collection of photographs of young women. In most of them, long stockings and garter belts are employed to frame the pubic area and to focus attention upon it. A suggestion of masochism is sought by the use in many of the pictures of chains binding the models' wrists and ankles. Some of the seated models, squarely facing the camera, have their knees and legs widespread in order to reveal the genital area in its entirety. In one of the pictures all of these things are combined. The model clad only in a framing black garter belt and black stockings, is chained to a chair upon which she is seated, facing the camera, with one knee elevated and both spread wide."

Notwithstanding all of the foregoing, the Supreme Court of the United States reversed per curiam citing *Redrup v. State of New York*, 386 U.S. 767.

In *Potomac News Co. v. United States*, 389 U.S. 47, the Supreme Court reversed the Fourth Circuit Court of Appeals' decision (*United States v. 56 Cartons containing 19,000 copies of a magazine entitled "Hellenic Sun"*, 373 F.2d 635 at page 640), which decision affirmed the conviction finding certain materials obscene, which the Circuit Court describes in the following language:

> "The magazine 'Hellenic Sun Number Two' is a collection of photographs of undressed men. Some are in color. There is one of a group

> of boys. They are posed in the out-of-doors, but generally languid models are not engaged in outdoor activity. In the composition of the photographs, the genitals of the models are made the focal point of the pictures. The camera's interest is languished upon the penis and, if the general pose of each model be languid, the penis in some of the pictures appears not in complete repose."

In spite of the above set forth vivid and explicit description of the material, the Supreme Court simply reversed per curiam citing *Redrup, supra.*

The U.S. Court of Appeals for the Ninth Circuit in *Culbertson v. State of California,* 385 F.2d 209, reversed the finding of obscenity and said at page 210:

> "We have examined the photographs in question. Each depicts four scantily clad women whose poses might be provocative to some. The pictures are not artistic, but are thoroughly convinced that they do not, in their expression go 'substantially beyond customary limits of candor.' "

The Supreme Court in *Burgin v. South Carolina,* 40 U.S.L.W. 3160 reversed an obscenity finding of magazines described by the Supreme Court of South Carolina as follows (178 S.E.2d 325):

> "I find the book 'Mirage' is a book containing color photographs of completely nude and/or semi-nude females. The semi-nudes only being that of females wearing garter belts, hose, and in some instances the males having on trousers with the front portion cut out or removed therefrom. Also, in poses directed so that the genital organ of the males and females in positions with the males

> and females emphasizing the pubic and rectal regions of the males and females.
>
> "In the magazine 'Fair Lady' also portrays similar color photographs of nude females in similar positions.
>
> "In the magazine 'Flesh Fantasy' is black and white, and color photographs of females with legs outstretched, completely nude, with females with clothes on undressing each piece of clothing in successive pictures, with the camera focussed completely upon the genital organs of the females."

Inasmuch as the *Miller* cases did not change that portion of the *Roth* test dealing with the appeal to pruriency and patent offensiveness, but changed merely that portion dealing with "utterly without redeeming social value." It is crystal clear that the aforementioned cases held "not obscene", materials which are directly comparable to the materials in the instant case. That is to say, there is nothing in the *Miller* cases nor the case of *Hamling v. The United States,* 94 S.Ct. 2887 that so changed the Supreme Court's expression of obscenity as to vary their ruling in cases involving extreme total nudity.

As stated previously, this writer is unaware of any decisions by this Court indicating that the age of the genitals depicted makes any difference whatsoever as to whether that depiction of nudity is obscene.

It is submitted therefore, as a matter of law, the constitution of the United States protected the items involved in the instant case. At the time of the alleged offense said items were not "patently offensive" as defined by this Court in the many decisions referred to.

2. Was Petitioner Deprived of Due Process of Law When the Court Allowed the Giving of the "Pandering" Instruction, and Was There Sufficient Evidence Produced at the Trial to Legally Justify the Invocation of That Doctrine?

The Postal Inspector first saw an advertisement of petitioner in a Hollywood, California newspaper, which paper was not distributed in New Mexico. The Postal Inspector involved also lived and worked in Los Angeles, California.

By the use of test names, the Inspector answered the advertisement and placed orders to be received in New Mexico. When the orders were received in New Mexico they were sent to the Postal Inspector in Los Angeles, California in a sealed condition.

In other words, based on all of the evidence, it appears that no one in the State of New Mexico received any of the advertisements involved in the instant case.

It is petitioner's position that none of the advertisements or brochures constitute the so-called "pandering doctrine" and that the District Court's instruction on that doctrine should not have been given and having been given was so prejudicial as to eliminate the possibility of petitioner having a fair trial. The pandering instruction, in effect, was that no matter what evidence there may be as to the extreme scientific value of the materials, if it is pandered you can disregard the evidence of scientific value and find the materials obscene anyway.

The so-called pandering doctrine was first enunciated in the cases of *Ginzburg v. United States*, 383 U.S. 463, and *Mishkin v. New York*, 383 U.S. 502. The

pandering instruction was further approved by the Supreme Court in the form given in the instant case in the case of *Hamling v. United States*. In *Hamling* the Supreme Court indicated that the pandering evidence as stated in *Ginzburg* and *Mishkin* was appropriate and that an appropriate instruction could be given. However, the Supreme Court in *Hamling* did not amplify the type of situation under which a pandering instruction could be given. That is to say, a set of facts as strong as was prevalent in *Miller* or *Mishkin* or *Hamling*, is necessary for the pandering evidence to be admitted and for the pandering instruction to be given.

Since the Court overruled defendant's objection concerning the receipt of pandering evidence and the giving of the pandering instruction, the petitioner feels that it is necessary to talk about what is the so-called "pandering aspects" as enunciated in the *Ginzburg* and *Mishkin* cases, *supra*.

In the *Ginzburg* and *Mishkin* cases, *supra*, the United States Supreme Court for the first time enunciated a so-called new pandering doctrine, which could be considered, as they said, by Courts in determining whether materials alleged to be obscene were, in fact, obscene. The Court stated in *Ginzburg, supra*, as follows:

> "We perceive no threat to First Amendment guarantees in thus holding that in *close* cases, evidence of Pandering may be probative with respect to the nature of the material in question, and thus satisfy the Roth test." [Emphasis added].

It is important to note the facts of the *Ginzburg* and *Mishkin* cases in order to properly perceive the

limits of the application of the so-called "pandering" doctrine.

In *Ginzburg, supra,* at page 945, the court described the activities relating to pandering as follows:

> "Besides testimony as to the merits of the material, there was abundant evidence to show that each of the accused publications was originated or sold as stock in trade of the sordid business of pandering—'the business of purveying textual or graphic matter openly advertised to appeal to the erotic interest of their customers.' EROS early sought mailing privilege from the postmasters of Intercourse and Blue Ball, Pennsylvania. The trial court found the obvious, that these hamlets were chosen only for the value their names would have in furthering petitioner's efforts to sell their publications on the basis of salacious appeal; the facilities of the post offices were inadequate to handle the anticipated volume of mail, and the privileges were denied. Mailing privileges were then obtained from the postmaster of Middlesex, New Jersey. EROS and LIAISON thereafter mailed several million circulars circulating subscriptions from the post office; over 5500 copies of the Handbook were mailed. The 'leer of the sensualist' also permeates the advertising for the three publications. The circulars sent for EROS and LIAISON stressed the sexual candor of the respective publications, and openly boasted that the publishers would take full advantage of what they regard an unrestricted license allowed by law in the expression of sex and sexual matters."

Footnote 9, at page 946 quoted from the advertising brochures, inter alia, as follows:

> "Footnote 9 . . . EROS is a new quarterly devoted to the subjects of love and sex. In a few short weeks since its birth, EROS has established itself as the rave of the American intellectual community—and the rage of the prudes everywhere! And it's no wonder: EROS handles the subjects of love and sex with complete candor. The publication of this magazine—which is frankly and avowedly concerned with erotics—has been enabled by recent court decisions ruling that a literary piece or painting, though explicitly sexual in content has a right to be published if it is a genuine work of art."

In *Mishkin, supra,* the Supreme Court summarized the defendants' activities as follows, at page 961:

> "Many, if not most, are photo-offsets of typewritten books and illustrated by authors and artists according to detailed instructions given by the appellant. Typical of appellant's instructions was that related by one author who testified that appellant insisted that the books be 'full of sex scenes and lesbian scenes . . . The sex had to be very strong, it had to be rough, it had to be clearly spelled out . . . I had to write sex very bluntly, make the sex scenes very strong . . . the sex scenes had to be unusual sex scenes between men and women and women and women, and men and men . . . He wanted scenes in which women were making love with women . . . he wanted sex scenes in which there were lesbian scenes. He didn't call it lesbian, but he described women making love to women and men making love to men, and there were spankings and scenes—six in an abnormal and irregular fashion.' Another

author testified that appellant instructed him to 'deal very graphically with . . . the darkening of the flesh under flagellation . . .' Artists testified in similar vein as to appellant's instructions regarding illustrations and covers for the books."

In thus enunciating the so-called "pandering" aspect, the Supreme Court appeared to prosecutors to give sanction to prosecution of material which hitherto had not been considered obscene.

The United States Supreme Court in later decisions clarified its position with regard to the so-called "pandering" aspect. Even in *Hamling v. United States, supra,* the case in which the Supreme Court affirmed the use of the pandering instruction as enunciated earlier in *Ginzburg and Mishkin,* the facts were as follows:

The brochure in question was described thusly:

"The folder opens to a full page splash of pictures portraying heterosexual and homosexual intercourse, sodomy and a variety of deviate sexual acts. Specifically, a group picture of nine persons, one male engaged in masturbation, a female masturbating two males, two couples engaged in intercourse in reverse fashion while one female participant engages in fellatio of a male; a second group picture of six persons, two males masturbating, two fellatrices practising the act, each bearing a clear depiction of ejaculated seminal fluid on their faces; two persons with a female engaged in the act of fellatio, and the male in female masturbation by hand; two separate pictures by males engaged in cunnilinction, a film strip of six frames depicting lesbian love scenes including a cunnilinguist in action and a female masturbation with another's

hand and a vibrator, and two frames, one depicting a woman mouthing the penis of a horse and a second poising the same for entrance into her vagina."

The reverse side of the brochure contained a facsimile of Illustrated Report's cover, and an order form for the Illustrated Report. It also contained the following language:

"THANKS A LOT MR. PRESIDENT.

A monumental work of research and investigation has now become a giant of a book. All the facts, all of the statistics are presented in the best possible format . . . and completely illustrated in black and white and in full cover. Every facet of the most controversial public report ever issued covered in detail.

The Book is a MUST for the research shelves of every library, public or private. Seriously concerned with full and intellectual freedom and adult selection.

Millions of dollars of public funds were expended to determine the PRECISE TRUTH about erotism in the United States today, yet every possible attempt to suppress this information was made from the very highest levels.

Even the President dismissed the fact out of hand. The attempt to suppress this volume is an inexcusable insult directed at every adult in this country. Each individual MUST be allowed to make his own decision; the facts are inescapable. Many adults, MANY OF THEM, will do just that after reading this REPORT. In a truly free society, a book like this wouldn't even be necessary."

As can be seen, the factual situation in *Ginzburg* and *Mishkin* and *Hamling* were extreme and ultimate as far as the pandering aspects are concerned. It is important to study the decisions which clarify the so-called pandering doctrine.

The United States Supreme Court clarified its position with regard to the so-called pandering doctrine by reversing per curiam many cases which illustrated strikingly that the so-called pandering aspect enunciated in *Ginzburg* and *Mishkin* would not be considered to have any general widespread application, but rather should be considered only as illustrative of the facts as they appeared in *Ginzburg* and *Mishkin*.

In the case of *Redrup v. New York*, 87 S.Ct. 1414 and in a whole group of cases (*Schackman v. California*, 87 S.Ct. 2107; *Avansino v. New York*, 87 S.Ct. 2093; *Shepherd v. New York*, 87 S.Ct. 2093; *Friedman v. New York*, 87 S.Ct. 2091), the Supreme Court subsequent to the cases of *Ginzburg* and *Mishkin* simply stated that materials which were entirely comparable to the materials in the case were not obscene. The obvious conclusion to be drawn therefore was that the materials were not obscene without substantial proof of the "pandering" aspect.

In this respect, in the *Redrup, supra*, case, it involved sales of material on prominent display in bookstores.

A Ninth Circuit decision very similar factually to the case at bar clarified simple mailing or mail order situation as not constituting pandering. In the case of *Grant and Wissman v. United States of America*, 380 F.2d 749, the Ninth Circuit Court of Appeals reversed a conviction for mailing alleged obscene materials and set forth as its reason the group of United

States Supreme Court decisions set forth above. It commented in that case that the materials were roughly comparable and therefore there was no basis for holding the materials to be obscene. It would seem incontrovertible then from the *Grant and Wissman* case that there was also no foundation in a mail order case for determining that the simple mailing of materials would constitute a so-called "pandering" aspect, which would thereby permit a finding of obscenity. In this connection, it should also be noted that the brochure involved in the *Grant and Wissman* case which advertised the materials was in all respects more candid than or comparable to any of the mailing pieces involved in the case at bar.

In the case *Luros v. United States of America*, 389 F.2d 200 the prosecution admitted that certain nudist and lesbian materials were not obscene *per se*, but contended that the conviction was justified under a "pandering" theory. The court summarized the evidence on the "pandering" theory, and then stated at page 204:

> "No conduct of appellants was offered, which could be evaluated on its face as demonstration of a prurient appeal superadded in the production or sale of the magazines. Of all the conduct charged, we fail to see a scintilla of proof that *Luros* or anyone else under his control gave directions or edited pictures with resultant publication to represent sex in a lustful, morbid ar shameful way. Appellants' convictions on these counts must be reversed."

The court went on to further delineate the limitations of the application of the doctrine of *Mishkin* and *Ginzburg* as follows at page 204:

"Nor did the government offer any competent evidence outside of the books themselves to demonstrate their pruriency. See *United States v. Klaw*, 350 F.2d 155 (2 Cir. 1965). Again the government urges that the conviction be sustained under proof of the appellant's conduct. But we again find no evidence to sustain a criminal conviction under the concept of 'pandering' where the books are of the kind which otherwise have been declared not to be obscene themselves. Under such circumstances, there must exist independent evidence of prurient appeal and patent offensiveness, in the production or sale and distribution. There is no claim of a prurient appeal in the advertising circulars mailed. However, the government relies upon *Mishkin v. New York*, 383 U.S. 502, 505 (1966), where the defendant gave his authors specific instructions as to research, format and content in order to give the stories prurient appeal for sexual deviates.

The evidence does substantiate appellants' key role of approval and actual editing of the manuscripts submitted. For this alone is not actionable. *United States v. Klaw*, 350 F.2d 155 (2 Cir. 1955); *Aday v. United States*, 388 U.S. 447 (1967), reversing *United States v. West Coast News Co.*, 357 F.2d 855 (6 Cir. 1966); *Books, Inc. v. United States*, 388 U.S. 449 (1967) reversing 358 F.2d 935 (1 Cir. 1966). Here the only evidence comparable to *Mishkin* relates to Luro's editing the covers and at one time telling his editor that 'nurse and lesbian work . . . seems to be selling and doing well.' Since the written portrayal of lesbianism is not obscene in itself,

> we fail to see that an implied direction to sell this type of literature can suddenly transform the material so as to make it actionable. The mere act of selling the literature otherwise could be condemned and easily prosecuted."

In *United States v. Baranov*, 418 F.2d 1051, the court had a situation of the defendants engaged in the mail order business and charged with the use of the mail for non-mailable matter containing advertisements where obscene matter could be obtained as well as for the carriage of obscene matter. In short, a situation exactly, in point factually, as that involved in the instant case.

In the *Baranov* case, the government conceded that the case depended on the doctrine of pandering because it was a close case. The Court of Appeals of the Ninth Circuit said on page 1053:

> "We find very little evidence of pandering in the record; certainly nothing approaching the evidence of that kind which tipped the scale in favor of conviction of *Ginzburg*. We are therefore compelled to conclude that, in view of the Government's concession and stipulation at the outset of the trial, the record before us does not support a jury determination in this case, as the materials here in question are obscene in the constitutional sense.
>
> In reaching this conclusion, we have been guided by several recent decisions of the Supreme Court which indicate what types of activity do not constitute pandering in the *Ginzburg* sense. In one of these decisions, *Redrup v. New York*, 386 U.S. 767, 87 S.Ct. 1414, 18 L.Ed.2d 515 (1966),

the court reversed the conviction involving the sale of allegedly obscene material. The publications in question were displayed openly at a newsstand. The Court held that the mere display and sale of marginally obscene materials does not constitute the sort of pandering which they found significant in *Ginzburg. Redrup* at 769, 87 S. Ct. 1414.

Other activities which the Supreme Court evidently does not consider to be pandering are demonstrated in a series of one sentence reversals citing *Redrup,* as authority. *Aday v. United States,* 388 U.S. 447, 87 S.Ct. 2095, 18 L.Ed. 2d 1309 (1967) reversing *West Coast News Co.* 357 F.2d 855 (6 Cir. 1966). (References on allegedly obscene books available from the same publisher containing prurient materials) *Books, Inc. v. United States,* 388 U.S. 449, 87 S.Ct. 2098, 18 L.Ed. 2d 1311 (1967) reversing 358 F.2d 935 (1 Cir. 1966). Lurid pictures of allegedly obscene books. *Potomac News Co. v. United States,* 389 U.S. 47, 88 S.Ct. 233, 19 L.E. 2d 46 (1967) purveyor intended to distribute the magazine among male homosexuals at a markup from 24 cents to $5.00 a copy.

In *Grand v. The United States,* 38 F.2d 748 (9th Cir. 1967) we reversed the conviction under Section 1461 citing as authority ten recent Supreme Court decisions in which State Court Judgments in obscenity cases were also reversed in one *sentence* opinion citing *Redrup.*

Added to this list are eight more recent decisions which were cited in the margin. Under the special circumstances of this case, as described above, and in the light of the controlling Supreme

Court decisions which we have cited, we hold the conviction of the defendants under 18 U.S.C. Section 1461 cannot stand. Therefore, without reaching any additional arguments advanced by defendants on this appeal (see Note 1), we reverse the judgments and remand to the Court for the dismissal of the indictment."

Conclusion.

It is respectfully submitted that the Petition for Certiorari should be granted and the decision of the United State Court of Appeals for the Tenth Circuit affirming the conviction of petitioner should be reversed.

Respectfully submitted,

BURTON C. JACOBSON,
Attorney for Petitioner.

APPENDIX A.

Opinion of the Tenth Circuit Court of Appeals.

United States Court of Appeals, Tenth Circuit.

United States of America, Plaintiff-Appellee, v. Jacob James Dost and Thomas Edward Kilfoyle, Defendants-Appellants. No. 76-1829, No. 76-1830.

Appeal from the United States District Court for the District of New Mexico (D.C. No. CR-76-85).

Filed: May 1, 1978.

Ronald F. Ross, Assistant United States Attorney (Victor R. Ortega, United States Attorney, on the brief), for Plaintiff-Appellee.

Burton C. Jacobson (John B. Leyba, on the brief), for Jacob James Dost, Defendant-Appellant.

David M. Ebel (Davis, Graham & Stubbs, on the brief), for Thomas Edward Kilfoyle, Defendant-Appellant.

Before SETH, Chief Judge, and McWILLIAMS and McKAY, Circuit Judges.

McWILLIAMS, Circuit Judge.

In the first count of a four-count indictment, James Dost and Thomas Kilfoyle were charged with mailing nonmailable matter from Los Angeles, California, to Roswell, New Mexico, in violation of 18 U.S. § 1461. The material in question was an advertising letter giving information as to where, how, from whom, and by what means certain nude photographs could be obtained. In the other three counts, the two defendants were also charged with mailing other nonmailable matter from Los Angeles, California, to Roswell, New

Mexico, namely, obscene photographs, in violation of 18 U.S.C. § 1461. Each of the latter three counts was based on a separate mailing. A jury convicted the defendants on all four counts, and each now appeals his sentence. We affirm.

Both defendants assert that the photographs in question were not obscene, as a matter of law, and that the trial court erred in submitting the issue to the jury. We disagree. The photographs in question were of ten- and eleven-year-old girls, in the nude, in suggestive poses, and doing a variety of lewd acts. On the issue of obscenity, the photographs in a very real sense speak for themselves. However, the prosecution did not rest there, and called two expert witnesses, both clinical psychologists, who testified at length. The defense countered with some expert witnesses of their own. However, all this created was an issue of fact. There is ample evidence to support the jury's determination that the photographs were obscene. We think the trial court in its definition of obscenity complied with Miller v. California, 413 U.S. 15 (1973).

The trial court instructed the jury concerning the effect to be given any evidence of pandering. The instruction given was couched in language from Ginzburg v. United States, 383 U.S. 463 (1966). Both defendants now claim that the trial court erred in giving the so-called pandering instruction. We disagree.

The jury was instructed that in determining whether the photographs in question were obscene, they could consider any evidence of "pandering" in making such determination. Pandering was then defined. In short, the jury was instructed that they could take into consideration the "setting" in which the photographs and

brochures were presented by the two defendants. Without going into greater detail, we find no error in the giving of the trial court's instruction on pandering. It is common sense that the mode and manner in which the photographs were presented to the general public is one fact that may be considered in determining whether, under the *Miller* test, the photographs themselves are obscene. It is true that pandering was not charged in the indictment of the defendants, nor is it an element of the crimes which were charged. However, evidence of pandering can be relevant in determining whether the materials in issue are obscene. We find no error in the giving of the instruction. Hamling v. United States, 418 U.S. 87, 130 (1974).

Both defendants also challenge the grand jury proceedings which lead to the present indictment. At oral argument counsel conceded that he had an "uphill battle" on this particular point. In our view, counsel did not win his battle. We find nothing to indicate grand jury irregularity. United States v. Donahey, 529 F.2d 831 (5th Cir. 1976) and United States v. Evans, 542 F.2d 805 (10th Cir. 1976).

Kilfoyle asserts one additional ground for reversal. Dost conceded sending the materials in question through the mail, and his main line of defense was that the material was not obscene. Kilfoyle claims that the evidence is insufficient to tie him in with Dost, and that in any event he had no knowledge of the type of material being sent through the mail. We disagree.

Kilfoyle opened the Post Office box in Los Angeles to which inquiries were directed. In opening the box, Kilfoyle indicated that a part of the business was the mailing of "photographs." Both Kilfoyle and Dost

picked up the mail which had been sent to the box in response to advertisements placed in sex-oriented papers. And very significantly, when arrested, Kilfoyle blurted out, spontaneously and in response to no questioning, that he "had checked with an attorney and that an attorney had told him that it was all right to mail the merchandise that he was selling through the U.S. mails." This utterance clearly permits the inference that Kilfoyle knew the nature of the material in which he and Dost were dealing. The fact his lawyer may have given Kilfoyle some bad advice does not shield Kilfoyle from the consequences of his act. On the evidence, Kilfoyle is not an innocent bystander. United States v. Spoonhunter, 476 F.2d 1050 (10th Cir. 1973) and United States v. Bourassa, 411 F.2d 69 (10th Cir. 1969).

Judgment affirmed.

APPENDIX B.

Prohibiting the Sexual Exploitation of Children.

NOVEMBER 4, 1977.—Ordered to be printed.

MR. CONYERS, from the committee of conference, submitted the following Conference Report [To accompany S. 1585].

The committee of conference on the disagreeing votes of the two Houses on the amendment of the House to the bill (S. 1585) to amend Title 18, United States Code, to make unlawful the use of minors engaged in sexually explicit conduct for the purpose of promoting any film, photograph, negative, slide, book, magazine, or other print or visual medium, or live performance, and for other purposes, having met, after full and free conference, have agreed to recommend and do recommend to their respective Houses as follows:

That the Senate recede from its disagreement to the amendment of the House to the text of the bill and agree to the same with an amendment as follows:

In lieu of the matter proposed to be inserted by the House amendment to the text of the bill insert the following:

That this Act may be cited as the "Protection of Children Against Sexual Exploitation Act of 1977".

SEC. 2.(a) Title 18, United States Code, is amended by inserting immediately after chapter 109 the following:

"Chapter 110—SEXUAL EXPLOITATION OF CHILDREN

"Sec.
"2251. Sexual exploitation of children.

"2252. Certain activities relating to material involving the sexual exploitation of minors.

"2253. Definitions for chapter.

"§ 2251. Sexual exploitation of children

"(a) Any person who employs, uses, persuades, induces, entices, or coerces any minor to engage in, or who has a minor assist any other person to engage in, any sexually explicit conduct for the purpose of producing any visual or print medium depicting such conduct, shall be punished as provided under subsection (c), if such person knows or has reason to know that such visual or print medium will be transported in interstate or foreign commerce or mailed, or if such visual or print medium has actually been transported in interstate or foreign commerce or mailed.

"(b) Any parent, legal guardian, or person having custody or control of a minor who knowingly permits such minor to engage in, or to assist any other person to engage in, sexually explicit conduct for the purpose of producing any visual or print medium depicting such conduct shall be punished as provided under subsection (c) of this section, if such parent, legal guardian, or person knows or has reason to know that such visual or print medium will be transported in interstate or foreign commerce or mailed or if such visual or print medium has actually been transported in interstate or foreign commerce or mailed.

"(c) Any person who violates this section shall be fined not more than $10,000, or imprisoned not more than 10 years, or both, but, if such person has a prior conviction under this section, such person shall be fined not more than $15,000, or imprisoned

not less than two years nor more than 15 years, or both.

"§ 2252. Certain activities relating to material involving the sexual exploitation of minors

"(a) Any person who—

"(1) knowingly transports or ships in interstate or foreign commerce or mails, for the purpose of sale or distribution for sale, any obscene visual or print medium, if—

"(A) the producing of such visual or print medium involves the use of a minor engaging in sexually explicit conduct; and

"(B) such visual or print medium depicts such conduct; or

"(2) knowingly receives for the purpose of sale or distribution for sale, or knowingly sells or distributes for sale, any obscene visual or print medium that has been transported or shipped in interstate or foreign commerce or mailed, if—

"(A) the producing of such visual or print medium involves the use of a minor engaging in sexually explicit conduct; and

"(B) such visual or print medium depicts such conduct; shall be punished as provided in subsection (b) of this section.

"(b) Any person who violates this section shall be fined not more than $10,000, or imprisoned not more than 10 years, or both, but, if such person has a prior conviction under this section, such person shall be fined not more than $15,000, or imprisoned not less than two years nor more than 15 years, or both.

"§ 2253. Definitions for chapter

"For the purposes of this chapter, the term—

"(1) 'minor' means any person under the age of sixteen years;

"(2) 'sexually explicit conduct' means actual or simulated—

"(A) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex;

"(B) bestiality;

"(C) masturbation;

"(D) sado-masochistic abuse (for the purpose of sexual stimulation); or

"(E) lewd exhibition of the genitals or pubic area of any person;

"(3) 'producing' means producing, directing, manufacturing, issuing, publishing, or advertising, for pecuniary profit; and

"(4) 'visual or print medium' means any film, photograph, negative, slide, book, magazine, or other visual or print medium.".

(b) The table of chapters for title 18, United States Code, and for part I of title 18, United States Code, are each amended by inserting immediately after the item relating to chapter 109 the following:

"110. Sexual exploitation of children .....2251".

SEC. 3. (a) Section 2423 of title 18, United States Code, is amended to read as follows:

"§ 2423. Transportation of minors

"(a) Any person who transports, finances in whole or part the transportation of, or otherwise causes or facilitates the movement of, any minor in interstate or foreign commerce, or within the District of Columbia or any territory or other possession of the United States, with the intent—

"(1) that such minor engage in prostitution; or

"(2) that such minor engage in prohibited sexual conduct, if such person so transporting, financing, causing, or facilitating movement knows or has reason to know that such prohibited sexual conduct will be commercially exploited by any person;

shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

"(b) As used in this section—

"(1) the term 'minor' means a person under the age of eighteen years;

"(2) the term 'prohibited sexual conduct' means—

"(A) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex;

"(B) bestiality;

"(C) masturbation;

"(D) sado-masochistic abuse (for the purpose of sexual stimulation); or

"(E) lewd exhibition of the genitals or pubic area of any person; and

"(3) the term 'commercial exploitation' means having as a direct or indirect goal monetary or other material gain."

(b) The table of sections for chapter 117 of title 18, United States Code, is amended by striking out the item relating to section 2423 and inserting in lieu thereof the following:

"2423. Transportation of minors.".

SEC. 4. If any provision of this Act or the application thereof to any person or circumstances is held invalid, the remainder of the Act and the application of the provision to other persons not similarly situated or to other circumstances shall not be affected thereby.

And the House agree to the same.

That the Senate recede from its disagreement to the amendment of the House to the title of the bill and agree to the same.

JOHN CONYERS,
ELIZABETH HOLTZMAN,
LAMAR GUDGER,
HAROLD L. VOLKMER,
ALLEN E. ERTEL,
DALE E. KILDEE,
JOHN ASHBROOK,
TOM RAILSBACK,
PETER W. RODINO,
Managers on the Part of the House.

JOHN CULVER,
EDWARD M. KENNEDY,
BIRCH BAYH,
DENNIS DeCONCINI,
CHARLES McC. MATHIAS, JR.,
MALCOLM WALLOP,
STROM THURMOND,
Managers on the Part of the Senate.

JOINT EXPLANATORY STATEMENT OF THE COMMITTEE OF CONFERENCE

The managers on the part of the Senate and House at the conference on the disagreeing votes of the two Houses on the amendment of the House to the bill (S. 1585) to amend title 18, United States Code, to make unlawful the use of minors engaged in sexually explicit conduct for the purpose of promoting any film, photograph, negative, slide, book, magazine, or other print or visual medium, or live performance, and for other purposes, submit the following joint statement to the Senate and the House in explanation of the effect of the action agreed upon by the managers and recommended in the accompanying conference report: The House amendment to the text struck out all of the Senate bill after the enacting clause and inserted a substitute text. The Senate receded from its disagreement to the amendment of the House with an amendment which is a substitute for the Senate bill and the House amendment. The House amendment to the title changed the title to reflect the changes to the Senate bill by the House amendment to the text, and the Senate receded from its disagreement to the House amendment to the title.

The principal differences between the Senate bill, the House amendment and the substitute agreed to in conference are noted below, except for clerical corrections, conforming changes made necessary by agreements reached by the conferees, and minor drafting and clarifying changes.

The "long titles" differ as between the House and Senate versions. The conference substitute adopts the House provision.

The Senate bill has a "short title." The House amendment does not. The conference substitute adopts the Senate provision.

The Senate bill has a "Findings" section. The House amendment does not. The conference substitute adopts the House version.

The Senate bill contains an express requirement in proposed section 2251(a) that the crime be committed "knowingly." The House amendment does not. The conference substitute accepts the House provision with the intent that it is not a necessary element of a prosecution that the defendant knew the actual age of the child.

The House amendment prohibits the transportation of visual or printed matter actually transported in interstate or foreign commerce or mailed, whether or not the accused knew or had reason to know of such transporting or mailing. The Senate bill does not. The conference substitute accepts the House provision.

The Senate bill contains an amendment offered by Senator Bayh to prohibit certain activities relating to "live performances." The House amendment contains no comparable provision. The conference substitute

omits the Senate provision in light of the fact that the Conference substitute contains amendments to 18 U.S.C. 2423 which would prohibit the interstate transportation of any minor for the purpose of engaging in prohibited sexual conduct as defined in that section, if the conduct will be commercially exploited. The conferees believe that in most cases these provisions would cover the sexually explicit conduct of minors during live performances as drafted in the Bayh amendment.

Both the Senate bill and the House amendment contained an express "knowingly" requirement relating to the liability of any parent, legal guardian, or person under proposed section 2251(b). It is the intent of the conference committee that such parent, legal guardian or person have control over the actions of the child when permitting the child to engage in sexually explicit conduct. The proposed criminal act is not passive but is to be an expression of knowledge and control. This contrasts with the decision of the conference committee to omit the "knowingly" requirement in the first subsection of proposed section 2251 as was discussed previously.

The Senate bill and the House amendment contained identical definitions that were placed in different sections. In the conference substitute the definitions are unified for all sections of the new chapter 110 and placed at the end of the chapter. It is the intent of the conference committee that the definition of "print and visual medium" be interpreted broadly, i.e. "film" may include but not be limited to electronic visual images or videotapes. It is also the intent of the conferees that the definition of "sexually explicit conduct"

be interpreted so as to apply only to conduct that is sexual in nature. For example the term bestiality as used in this definition would only apply to sexual bestiality.

The Senate and House versions differ in their penalty provisions as follows:

(a) The Senate bill provides—

(i) for production, a $10,000 fine, or a two year minimum and a 10 year maximum imprisonment, or both, for the first offense; and for subsequent offenses, a $15,000 fine, or a 5 year minimum and 15 year maximum, or both;

(ii) for transportation etc., a $10,000 fine, or a one year minimum and a ten year maximum imprisonment, or both, for the first offense. For subsequent offenses, a $15,000 fine, or a 2 year minimum and a 15 year maximum, or both;

(iii) for the "Mann Act," a $10,000 fine or 10 years imprisonment, or both, the same as existing in law.

(b) The House amendment provides a $10,000 fine or 10 years imprisonment, or both, throughout.

The conference committee agrees that any person who violates proposed sections 2251 and 2252 of title 18 dealing with production and transportation will be fined not more than $10,000 or imprisoned not more than 10 years, or both, but, if such person has a prior conviction under these sections such person shall be fined not more than $15,000 or imprisoned not less than 2 years nor more than 15 years, or both. A minimum sentence has been agreed to therefore for the second conviction.

The Senate bill contains a section on the prohibition of transportation, sale or distribution for sale of material depicting sexual exploitation of minors. The House amendment does not. The conference substitute adopts the Senate provision with the modification that the visual or printed matter must be obscene and with the requirement that the production of the matter involved the use of a child engaging in sexually explicit conduct. It is the intent of the conference committee that if a minor has engaged in this sexually explicit conduct and there was a production of material using any printed or visual medium depicting such conduct that persons who knowingly transport, ship, or mail for the purpose of sale or distribution, or knowingly thereafter receive for sale or distribution, or knowingly thereafter sell or distribute for sale any such material are liable whether or not they have contact with the minor or the original production of the material.

Both the Senate bill and the House amendment contain amendments to section 2423 of title 18, United States Code. Although each version differs somewhat in form, the substantive provisions are very similar with two exceptions: (a) The House amendment does not include "simulated" sexual conduct within its prohibition. (b) The House amendment requires that there be some commercial exploitation of the prohibited sexual conduct. The Senate bill does not. The conference substitute adopts the House provisions.

The Senate bill amends existing Federal obscenity law to increase the penalties of each violation that involves the sexual exploitation of a minor. The House amendment does not. The conference substitute accepted the House provision because a version of section 2252 (relating to transportation and distribution of

explicit material) was agreed to with an obscenity standard.

The Senate bill contains a "severability" section. The House amendment does not. The conference committee accepts the Senate provision.

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